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Elisenda Casenas-Adams: Another Independence Referendum in 2014? Recent Developments in Catalonia

Posted on January 31 2013

Last week the Catalan Parliament adopted a 'Declaration of Sovereignty of the Catalan People' (85 votes in favour, 41 against and 2 abstentions), as the first step in its plan of 'National Transition', leading up to the holding of a referendum on the constitutional future of Catalonia in 2014. The declaration was jointly proposed and endorsed by the Catalan Government (governed by Convergència i Unió - CIU) and the main party in the opposition (Esquerra Republicana de Catalunya - ERC), among others (Iniciativa per Catalunya Verds - ICV, one 'critical vote' from Candidatura d'Unitat Popular - CUP).

The debate in the Parliament also included the consideration of an alternative declaration (Partit dels Socialistes de Catalunya - PSC) on 'The right to decide of the people of Catalonia', which omitted any reference to 'sovereignty', and provided specifically that the process would require an agreement with the Spanish Government and should guarantee a plurality of options. Considered together, and despite their important differences, the overall support for the right of Catalonia to decide its own constitutional future ('dret a decidir') is almost 80 % of the members of the Parliament.

The Declaration of Sovereignty was adopted in defiance of the Spanish Government (governed by Partido Popular - PP), which has made clear that it considers a Catalan referendum would be in violation of the Constitution and has stated it will use all legal avenues available to stop it. So far, it has not taken any action against the Declaration, as it is a political document, but it has requested an urgent report on it from its legal services to consider any possible effects it could have. With both levels of government preparing their constitutional strategies, the situation is being described as 'two trains driving toward each other'.

Background

The current process began on the 11th September 2012, (the Catalan 'Diada', commemorating the fight for Barcelona in 1714), when one and a half million people came out into the streets in Barcelona in support of independence for Catalonia. The Catalan Prime Minister, Artur Mas (CIU), called new elections to secure a mandate to hold a referendum and lead the process of 'national transition' to 'Catalonia's own state'. These elections became a pre-referendum in themselves, with Catalonia's right to decide and the different options for its constitutional future being the central focus of all parties (the austerity measures were also an important element). The results supported the holding of a referendum but strengthened the more hard-line ERC, with which Artur Mas has now had to reach an agreement to take his plan forward. The most notable losers, however, were the PSC and their intermediate federal option, which proposed a reform of the Constitution in order to improve the position of Catalonia within the overall system.

After the election, one of the central points of the agreement between CIU and ERC is to hold a referendum on Catalan Independence in 2014. Deciding on the date for the referendum actually delayed the agreement, as ERC initially insisted on having it in 2013. This agreement also sets out a plan for the process of 'National Transition' of Catalonia, with different steps as follows: 1. Declaration of Sovereignty of the People of Catalonia (first plenary session); 2. Enactment of a Statute on Consultations (beginning in January); 3. Start of negotiations with the Spanish State in order to reach an agreement on holding a referendum; 4. Creation of a Catalan Council for National Transition; 5. To have everything set up by the end of 2013 in order to hold the referendum in 2014. This can, however, be postponed by agreement between both parties.

Following the above, the Declaration of Sovereignty was adopted on 23d January and provides that, in accordance with the will of the people of Catalonia, the Parliament agrees to start the process towards them exercising their right to decide their collective political future. It then sets out the principles that will guide this process: Sovereignty, Democratic Legitimacy, Transparency, Dialogue, Social cohesion, Europism, Legality, Principal role for the Parliament and Participation.

The legality issue

Specialised legal opinion is divided on whether Catalonia could hold a referendum within the current constitutional framework. Arguments against it are based on Arts. 1 and 2 of the Constitution, which provide that 'National sovereignty belongs to the Spanish people' and that 'The Constitution is based on the indissoluble unity of the Spanish Nation', and on the exclusive competence of the central state over the 'Authorization of popular consultations through the holding of referendums' (Art. 149.1.32). It has, therefore, been put forward that the referendum would require the consultation of the whole of the Spanish people, or could not be held without a previous reform of the Constitution in this sense.

On the other hand, arguments in favour of the possibility of Catalonia being able to hold a referendum within the current constitutional framework are based on the democratic principle, also in Art. 1, which is one of the foundations of the system and informs the interpretation of the rest of the constitutional text. Acknowledging that independence would require a reform of the Constitution, it has been suggested that the referendum could be formulated as a consultation to Catalan citizens on the initiation of such a reform. The possible mechanisms for this would be either a referendum with the authorisation of the central authorities (on the basis of a state or Catalan statute), or a 'non referendum-consultation', which would then not require authorisation. In accordance with the Constitutional Court's case law, this could then not be based on the electoral register and could not involve the institutions or benefit from the safeguards of the ordinary electoral procedure (SSTC 103/2008).

Even if they follow the 'non-referendum consultation' option, which seems to be the Catalan Government's current preference due the central state's clear opposition to the referendum, there is a strong possibility it would be challenged before the Constitutional Court. In this case, previous case law seems to indicate the Court will not be very receptive to claims that Catalonia is a sovereign people and can decide its own constitutional future (SSTC 103/2008 and 31/2010). It has, however, accepted that Catalonia has the competence to hold 'non referendum consultations' more generally.

If, as they are threatening to do, the Catalan Government goes on with the consultation regardless, the Constitution authorises the Central authorities to take all measures necessary if 'a Self-governing Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain' (Art. 155). As a last resort, even the armed forces could be used in order to secure the "integrity" of Spain's territory (Art. 8).

There is still another possibility, at least in theory: the Constitution enables the Spanish Government to hold referendums on political issues of special importance (Art. 92). Such a referendum would not be legally binding, but its results would show the strength of the support for independence, and, at the same time, put a stop to the allegations that the central government is undemocratic. A well respected constitutional lawyer (Rubio Llorente) has suggested that this could be a way to ease the tension.

The European Union

The European Union is also playing a central role in this debate, to the extent that 'Catalonia, new state of Europe' was the slogan of the initial pro-independence march on September 11th 2012. Following the same line, Artur Mas' first proposed question for the referendum was 'Would you like Catalonia to be a new state of the European Union?'; and both the government agreement between CIU and ERC and the Declaration of Sovereignty also refer specifically to the holding of a consultation on Catalonia becoming a new State 'of Europe' or 'within the European Framework'.

Interestingly, the process of 'National Transition' itself is also being presented as located within the wider European constitutional framework. The Declaration of Sovereignty states that the process will defend and promote the founding principles of the European Union ('Europism') and will involve dialogue and negotiation with the Spanish state, the European Institutions and the international community ('Dialogue'). Evidence of this is also that Catalan citizens and Members of the European Parliament have appealed to different EU Institutions to obtain some recognition and even protection for Catalonia from Spain. The European Institutions have so far been largely unreceptive and, after making some comments that seemed to open the door for an independent Catalonia automatically becoming part of the EU, Viviane Reading, Vice-President of the European Commission and Commissioner for Justice, Fundamental Rights and Citizenship had to write a letter to the Spanish Government apologising and stating that the EU could not recognise a unilateral declaration of independence of a part of one of its Member States.

Independence and other options

Although there is a strong majority in the Catalan Parliament in favour of Catalonia's right to decide its constitutional future, there is a diversity of positions on what the final outcome of the process should be. Even within the governing coalition party, there are different opinions about the final objective of the 'National Transition'. Options include 'full independence' (Convergència Democràtica de Catalunya, ERC, CUP), a 'confederation with the Spanish State' (Unió Democràtica de Catalunya), and different forms of 'federalism' (ICV and PSC). As the legitimacy of their claim for the 'right to decide' is based on their strong majority, they are now faced with the complicated task of formulating a referendum (or consultation) question that has the agreement of all parties, and there have already been some suggestions of including different options apart from the status quo. On the other hand, the Catalan PP, which is opposed to the 'right to decide', has also announced it will put forward a proposal for a change in the financing system of Catalonia, as the 'constitutional' alternative to the above.

Implications for Scotland?

There is no doubt that events in Scotland are influencing those in Catalonia. If both referendums are to be held in 2014, the question then becomes whether events in Catalonia might influence those in Scotland. One way in which Catalonia could influence Scotland would be by increasing the level of confrontation between the 'yes' and 'no' campaigns, although this seems unlikely. A second possibility would be by bringing the possible third option/second question back into the debate, although the current process seems a bit too far ahead for that. Where the influence of developments in Catalonia might be felt more in Scotland is in attempts to negotiate with the European Institutions, as both Catalan and Spanish Governments are putting them under a lot of pressure. A possible breakaway-independent Catalonia is much more problematic for the EU than a possible negotiated-independent Scotland, but in order to avoid having to face the former they might make the procedures for accession of newly-independent regions very complicated for all possible candidates.

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Comments

Zoran Oklopčič
15 February 2013 20:46

Thank you, Elisenda, for an insightful analysis. Would you agree with some commentators who have argued that the Canadian Secession Reference might serve as an inspiration for interpreting the Spanish Constitution in a way that would facilitate the secession of Catalonia, or at least mandate the process of negotiations in good faith between Catalonia and Spain? That would perhaps be the best solution, but it is hard for me to see how would this constitutional 'transplant' adhere in the Spanish context given the pretty explicit wording of art. 2. ...

Anonymous
27 February 2013 07:36

<http://www.referendum.ed.ac.uk/another-independence-referendum/>

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